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BEFORE THE

ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF: )  
 )  
ILLINOIS COMMERCE COMMISSION )  
On Its Own Motion )  
-vs- ) No. 01-0707  
PEOPLES GAS, LIGHT AND )  
COKE COMPANY )  
 )  
Reconciliation of revenues )  
collected under gas adjustment )  
charges with actual costs )  
prudently incurred )

Chicago, Illinois

October 27, 2004

Met, pursuant to adjournment, at 1:45 p.m.

BEFORE :

MS. EVE MORAN,  
Administrative Law Judge

APPEARANCES :

McGUIREWOODS, LLP., by  
MS. MARY KLYSCHEFF and  
MR. THOMAS MULROY  
77 West Wacker Drive, Suite 4100  
Chicago, Illinois, 60601  
appearing for The Peoples Gas, Light and  
Coke Company;

1 APPEARANCES (Cont'd.):

2 MS. JULIE SODERNA and  
MR. STEPHEN WU  
3 208 South LaSalle Street, Suite 1760  
Chicago, Illinois  
4 appearing for Citizens Utility Board;

5 MR. MARK KAMINSKI,  
MS. SUSAN L. SATTER and  
6 MR. RANDOLPH CLARKE  
100 West Randolph Street  
7 Chicago, Illinois 60601  
appearing for People of the State of  
8 Illinois;

9 MR. RONALD D. JOLLY,  
MR. MARK POWELL, and  
10 MR. CONRAD REDDICK  
30 North LaSalle Street, Suite 900  
11 Chicago, Illinois 60602  
appearing for the City of Chicago;

12 MR. SEAN R. BRADY and  
13 MR. JAMES E. WEGING  
160 North LaSalle Street, Suite C-800  
14 Chicago, Illinois 60601  
appearing for Staff of the Illinois  
15 Commerce Commission.

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1 JUDGE MORAN: By the authority of the Illinois  
2 Commerce Commission, I now call Docket No. 01-0707.  
3 It is the Illinois Commerce Commission on its own  
4 motion vs. Peoples Gas, Light and Coke Company, and  
5 it is a reconciliation of revenues collected under  
6 gas adjustment charges with actual costs prudently  
7 incurred.

8 Will the parties please identify  
9 themselves for the record, please.

10 MR. BRADY: Appearing on behalf of staff of the  
11 Illinois Commerce Commission, Sean R. Brady and  
12 James E. Weging, 160 North LaSalle Street, Suite  
13 C-800, Chicago, Illinois, 60601.

14 MR. JOLLY: Appearing on behalf of the City of  
15 Chicago, Ronald D. Jolly, Mark Powell, and Conrad R.  
16 Reddick, 30 North LaSalle Street, Chicago, Illinois,  
17 60602.

18 MR. KAMINSKI: Mark Kaminski, Susan Satter, and  
19 Randolph Clarke on behalf of the Illinois Attorney  
20 Generals Office, 100 West Randolph Street, Chicago,  
21 Illinois, 60601, on behalf of People of the State of  
22 Illinois.

1 MS. SODERNA: Appearing on behalf of Citizens  
2 Utility Board, Julie Soderna and Stephen Wu, 208  
3 South LaSalle, Suite 1760, Chicago, Illinois, 60601.

4 MS. KLYSCHEFF: For Peoples Gas, Light and Coke  
5 Company, Mary Klyscheff and Thomas Mulroy;  
6 McGuireWoods, 77 West Wacker, Chicago, 60601.

7 JUDGE MORAN: Okay: A few little preliminary  
8 things, the status hearing that was set for November  
9 9th is officially cancelled, unless there's some  
10 reason that I don't know about, and just so there's  
11 no confusion, any party wishing to notice up a  
12 deposition, issue that notice his or herself, if you  
13 look at the last ALJ ruling I made, there's a  
14 reference to a Supreme Court ruling and see what you  
15 have to put in there.

16 How are the parties doing with the DBDs  
17 and CDs?

18 MR. BRADY: At this point, staff has taken a look  
19 at some of the materials, but we haven't found any  
20 need at this point to follow-up on any additional  
21 questions, although I think Ms. Klyscheff and  
22 Peoples Gas has provided, pursuant to your

1 direction, an identification of the documents that  
2 were responsive to a few of the outstanding  
3 questions, so there are really no outstanding  
4 matters at this time.

5 MR. JOLLY: We are continuing our review of the  
6 electronic data, and at this point I don't think we  
7 have any problems.

8 MR. KAMINSKI: We are continuing to look at that  
9 data, but we're not finished.

10 JUDGE MORAN: Okay. Does any party have an  
11 objection to CUB's application for subpoenas?

12 MR. MULROY: Your Honor, we are now up to I think  
13 24 requests for depositions and interrogatories --  
14 and a vastly expensive time period in this case.

15 We have asked you in our motion or our  
16 response to consider limiting the number of  
17 depositions in this case to a number around ten, so,  
18 from that standpoint, we have an objection, just  
19 because 24 depositions is huge number of depositions  
20 in any case, especially in a case like this. It's  
21 been pending for three years. It's going to be  
22 extraordinarily time-consuming for our executives

1 and people who are trying to run this business. I  
2 would appeal to your discretion in this matter.

3 JUDGE MORAN: Here's my thought on that. I don't  
4 want to involve myself in a decision about who's  
5 deposed and who's not deposed; however, if the  
6 situation does get to be duplicative or if the same  
7 questions are asked of different witnesses,  
8 certainly you can bring a motion. I just want to  
9 keep the lawyers focused on discovery and keep you  
10 active, and I don't have a real detailed sense of  
11 who would give you what information, so if it  
12 becomes a situation where you need to file a motion,  
13 you can certainly do so, but until it comes to that  
14 point, I believe I will leave the lawyers to that to  
15 do what you have to, and I also take staff's motion  
16 as a request now for leave to take depositions.

17 I don't necessarily think -- I did not  
18 read staff's motion as a positive guarantee that all  
19 of those, what, 18 witnesses were going to go  
20 necessarily. I took it more as a request up front  
21 to get everything out of the way and so that things  
22 would proceed quicker.

1                   So, Mr. Mulroy, your objection then is  
2 taken under advisement, but CUB's application for  
3 subpoenas is granted and I will forward the  
4 subpoenas to the Clerk's office.

5       MS. SODERNA: Can I interrupt quickly. Sorry.  
6 We, being the parties represented here, and Peoples  
7 earlier today had an off-the-record discussion and  
8 indicated that since one of the subpoena recipients  
9 is, in fact, a Peoples Energy employee and Peoples  
10 has agreed to produce her on her notice, so we'll be  
11 withdrawing the application to subpoena with regard  
12 to her.

13       JUDGE MORAN: So you don't need the  
14 application --

15       MS. SODERNA: Right. Do you want me to do a  
16 formal motion withdrawing?

17       JUDGE MORAN: No, I just won't give it to the  
18 clerk. I think that's easier.

19       MS. SODERNA: Great. Thanks.

20       JUDGE MORAN: And does any party have an  
21 objection to staff's application for subpoenas to  
22 issue?

1 (No response.)

2 Okay. That being the case, your  
3 application is granted and I will forward your  
4 subpoenas to the Clerk's Office.

5 Now I called this status hearing really  
6 to address or have you address in most part amongst  
7 yourselves the issues that Peoples raised in its  
8 response to staff's motion to take formal discovery,  
9 so the first item that Peoples raised was taking the  
10 depositions of Delora Ware (sic) and for all  
11 witnesses that already had prefiled testimony.

12 I'm going to allow staff to do that.  
13 This is discovery. It's not an evidence deposition  
14 and I think staff should be permitted to take these  
15 depositions, but keep in mind that time is short and  
16 try to stay away from duplicative or otherwise use  
17 of time that's not well spent.

18 Peoples also argued that there were  
19 certain witnesses that were duplicative of one  
20 another. It seems to me that what Peoples are  
21 saying was that staff -- on staff's list there were  
22 two were -- of ten, two witnesses from the same



1 department or same group. That goes back to what I  
2 was saying before. I don't interpret staff's motion  
3 as a firm commitment to depose every single witness  
4 on that list. That's not what you are saying, is  
5 that?

6 MR. MULROY: No. No. I hear what your  
7 understanding is. I'm afraid I might be wrong since  
8 we scheduled all these witnesses with dates now.

9 JUDGE MORAN: Are you planning to take every  
10 single deposition of all these witnesses or have you  
11 just scheduled them?

12 MR. BRADY: We have scheduled them with the  
13 intent of taking all of them. We have been able to  
14 get a schedule so that at least the 18 people that  
15 we have put on our list we finish by December 1st,  
16 which was one of Peoples Gas' concerns. They  
17 propose a cut-off date of December 3rd.

18 To the extent that we get information  
19 from a witness that answers our questions that may  
20 be applicable that we may be intending to ask of  
21 another witness, we may not need to call that  
22 witness. We may need to waive that, but, of course,

1 there's a coordination matter of handling that with  
2 CUB, and Peoples, and with all the other parties.  
3 We haven't coordinated among ourselves all the  
4 issues that need to be addressed and we intend to do  
5 that within the next day or so.

6 JUDGE MORAN: Okay. So what you are saying is  
7 that even if your questions are answered, somebody  
8 else might have a question of a witness?

9 MR. BRADY: That might be correct.

10 MR. JOLLY: Then there's the possibility some of  
11 the people who were on staff's list were people we  
12 were thinking of noticing up depositions for, and we  
13 did it in light of staff's motion, so that we may  
14 have questions for some of those people.

15 JUDGE MORAN: So I'm not quite sure. Does that  
16 mean you think that all of these 20-some witnesses  
17 are going to be necessary -- that deposing all of  
18 these witnesses are necessary?

19 MR. JOLLY: Our list of potential deponents was  
20 not as extensive as staff's, but given staff has  
21 noticed up these 18 depositions that we plan on  
22 participating in and we have questions for the

1 witnesses, we like to ask them, but, again, we had a  
2 smaller -- a subset of those, plus an additional six  
3 witnesses, the four who were included in the  
4 subpoenas yesterday and two for whom we'll issue  
5 notices of deposition after the hearing today in the  
6 next day or so, so we -- as I said, we plan on  
7 participating and at least observing the depositions  
8 for some witnesses who we were interested in we  
9 would probably have questions. We may not have  
10 questions for all of them.

11 JUDGE MORAN: I'm not quite sure that answers my  
12 question. I understand that you won't know hard and  
13 fast until you get information, but you really think  
14 24 witnesses?

15 MR. JOLLY: Again, I mean, I think we are not  
16 necessarily going to ask questions of all of the 18  
17 witnesses that staff --

18 JUDGE MORAN: Right. Right.

19 MR. JOLLY: -- had.

20 JUDGE MORAN: You have a substitute?

21 MR. JOLLY: We had some of the people who staff  
22 requested depositions of we also have on our list.

1 It was a smaller number, and then we had six  
2 additional people. Collectively, we were probably  
3 around 12, maybe something like that. I don't  
4 recall exactly, but, in any event, but given that  
5 staff is deposing these other people, we anticipate  
6 participating in the deposition, whether that means  
7 just observing, it might mean that, or potentially  
8 we may have a few questions given that the people  
9 have been called and they're sitting there.

10 JUDGE MORAN: Well, I will give you the caveat  
11 that that's a lot of witnesses to depose, so please  
12 try and keep this as short, and sweet, and  
13 organized, and nonduplicative as possible.

14 MR. JOLLY: And that's what we are planning on  
15 doing. As Sean indicated, we are planning to met  
16 tomorrow and Friday to go over what topics each  
17 party has.

18 JUDGE MORAN: You might also think about  
19 conferring with opposing counsel as well so they can  
20 get as organized as they can, which leads me to my  
21 next segment of Peoples' response and that is  
22 Peoples asked that counsel furnish documents in

1 advance of the deposition, and I will urge you to do  
2 that as much as you can. I am not going to require  
3 it, but I will require you to stick to three hours  
4 that the Supreme Court rules require, so you need to  
5 use that three hours wisely, and that means as much  
6 as possible E-mailing opposing counsel what  
7 documents you are going to use 24 hours at least  
8 ahead of time or at least meeting with counsel  
9 before the deposition begins and showing counsel  
10 what documents you plan to use. There's so many  
11 documents in this proceeding that if you don't do  
12 that you are going to waste your own time.

13 All right. So that takes care of that.  
14 So you already have a schedule?

15 MR. BRADY: Yes, your Honor. Would you like a  
16 copy of it?

17 JUDGE MORAN: No.

18 MR. BRADY: I guess the only reason for your  
19 availability if there are objections that are  
20 raised.

21 JUDGE MORAN: You can -- if there's objections  
22 that are raised, you can give it to me at that time.

1 I don't want to interfere in your -- it's really why  
2 I called the status hearing today is to make sure  
3 you had a schedule. If you have already pounded out  
4 a schedule, then unless there's anything else that  
5 you want to talk among yourselves about, maybe pound  
6 out some scope issues while you are here all in one  
7 room, that might be good.

8 MR. BRADY: We talked a little bit about scope  
9 this morning. What we have is Peoples -- I don't  
10 know if you want to -- as I understand Peoples'  
11 statement this morning was staff had circulated a  
12 schedule and Peoples Gas said they don't have an  
13 objection to it at this point, that they were still  
14 checking to make sure everybody was available right  
15 on those dates, so I guess what I would like is to  
16 get some definitiveness in those responses and was  
17 wondering if you could tell me at this time when you  
18 would be able to confirm these deponents so we have  
19 definitiveness on our end.

20 MS. KLYSCHEFF: For the first batch --

21 MR. JOLLY: You may have to turn it over.  
22 There's a switch on the bottom.

1 (Whereupon, the  
2 microphone was turned  
3 on.)

4 MS. KLYSCHEFF: Okay. For the first batch,  
5 actually I'm meeting with some of the people  
6 tomorrow morning to confirm availability with what  
7 you have, the first five or six names, so we could  
8 probably have more solid information for dates for  
9 them at that point.

10 The others on the list I have partial  
11 feedback from several of them. We still have and I  
12 still have a couple of people I'm trying to pin  
13 down, so I'll endeavor to get more precise dates on  
14 those I hope by the end of the week, and then we did  
15 mention this morning a few of the dates on here,  
16 November 17th, 18th and 19th are going to be  
17 conflicts for us, so we'll toss out alternative  
18 dates for persons who are currently scheduled on  
19 those dates. I think we did discuss possible  
20 alternatives.

21 MR. BRADY: Right. Okay.

22 MR. JOLLY: I'll just add staff's schedule

1 anticipates the last deposition will be taken on  
2 December 1st. We do have the additional four that  
3 we identified in the subpoena yesterday and two more  
4 Peoples' witnesses who we will issue notices of  
5 depositions for soon, and we indicated to Peoples  
6 today that we'll work with them to hopefully to  
7 either fit them in days maybe there's only one  
8 deposition scheduled or maybe in the next few days  
9 after the December 1st date.

10 JUDGE MORAN: Aren't there dates on those  
11 subpoenas already?

12 MS. SODERNA: I filled in the following week,  
13 December 6th, on all four of them, because we hadn't  
14 worked out the time yet, so I was anticipating us  
15 working that out today and refining that schedule.

16 JUDGE MORAN: So I'll leave you alone for a few  
17 minutes.

18 MS. SODERNA: I think it's going to depend.  
19 These aren't actually Peoples' --

20 JUDGE MORAN: Oh, right, so you wouldn't know.

21 MS. SODERNA: -- employees, so it's going to  
22 depend upon their availability. I wanted to make



1 sure, because peoples had requested depositions be  
2 completed by December 3rd, and because of staff's  
3 outlined schedule it might go into that next week  
4 and I wanted to make sure that that was cleared with  
5 you.

6 JUDGE MORAN: Well, it's Peoples' objection or  
7 maybe objection is the wrong word. Is it your  
8 witnesses that -- I wasn't quite clear what the  
9 December -- early December cutoff date what exactly  
10 you were looking for. Was it your witnesses or --

11 MR. MULROY: Well, to complete the oral  
12 discovery, I guess all the depositions.

13 JUDGE MORAN: All the depositions?

14 MS. SODERNA: The time frame really impacts us  
15 more than it does Peoples because we have prepared  
16 testimony by January 7th. Obviously, these  
17 depositions are being conducted in order to prepare  
18 for testimony, so --

19 JUDGE MORAN: Can't you work something out, maybe  
20 have some of them -- what is the magic number  
21 there -- just to have a magic number?

22 MR. MULROY (Nodding head.)

1 MS. SODERNA: The problem is we don't know other  
2 witnesses' availability, so it's difficult to say  
3 today where we could fit in. Now it's the three  
4 individuals that would be subpoenaed, unless we just  
5 did it the week I indicated in the subpoena, which  
6 would be December 6th which would be clear.

7 JUDGE MORAN: Well, except for if those witnesses  
8 can't make it.

9 MS. SODERNA: It's, of course, depending upon  
10 their availability.

11 JUDGE MORAN: Right. And that also is prefiled  
12 testimony due in early January?

13 MS. SODERNA: January 7th. So it's to your  
14 advantage to complete them the way the schedule's  
15 laid out. We all discussed we can accomplish that  
16 by completing the depositions that early -- that  
17 first week in December.

18 JUDGE MORAN: Can you speed up the -- put the  
19 subpoena dates a little earlier, because then you  
20 are pushing? You are also pushing these people into  
21 Christmas and all sorts of other problems, right?

22 MS. SODERNA: Right. Looking at the schedule

1 that staff has laid out, I mean, that really the  
2 only possibility is to do it December 2nd and 3rd,  
3 just that week before, and I think we had discussed  
4 leaving those dates open in case there were some  
5 other juggling that had to happen.

6 JUDGE MORAN: Can you take two depositions in one  
7 day?

8 MS. SODERNA: Yes, that's what we are  
9 contemplating doing in most cases.

10 MR. JOLLY: There are cases in the schedule where  
11 there's only one deposition scheduled. I mean, I  
12 think it's a matter of just sitting down and seeing  
13 what peoples' schedules are. I think it's a little  
14 harder with respect to people who we're asking  
15 subpoenas for because we just were not in contact  
16 with them.

17 JUDGE MORAN: This is -- here's the thing.  
18 There's dates on subpoenas. It sounds to me like  
19 you should change those dates no matter what.

20 MS. SODERNA: Right. I see your point, so you  
21 would like us to complete those before that December  
22 6th week?

1 JUDGE MORAN: Well, not only that, but if you  
2 issue the subpoenas with the dates after December  
3 6th and something happens, then that would be later  
4 rather than sooner --

5 MS. SODERNA: Right.

6 JUDGE MORAN: -- and that, in addition to the  
7 fact that Peoples has a problem with it, there are  
8 other problems that I can foresee, too, like  
9 Christmas, and the deadlines, and all that.

10 MS. SODERNA: Let me ask this, Peoples. I assume  
11 that your counsel wants to be present at those  
12 depositions, because otherwise --

13 MR. MULROY: Yes, that would be good.

14 MS. SODERNA: -- otherwise 16th, 17th, 18th,  
15 those days, are out, so we could do the 2nd and the  
16 3rd.

17 JUDGE MORAN: How many subpoenas do you have?

18 MS. SODERNA: Well, there will be three.

19 JUDGE MORAN: Three? Okay.

20 MS. SODERNA: If we could do the 2nd and the 3rd.

21 JUDGE MORAN: Can't you do something earlier,  
22 because with subpoenas you have no control over

1 these witnesses.

2 MS. SODERNA: Right. The problem is, well, staff  
3 is unavailable the 11th.

4 JUDGE MORAN: November the 11th, Armistice Day?

5 MS. SODERNA: Yes, that's a consideration also.  
6 The 15th and 16th is only one scheduled per day, so  
7 that's a possibility, so you are saying to put the  
8 date on the --

9 JUDGE MORAN: I'll give you like five minutes to  
10 just figure something out and then what we'll do is  
11 you can E-mail me with the new dates --

12 MS. SODERNA: Sure.

13 JUDGE MORAN: -- because there may be other  
14 conflicts. All right. So five minutes.

15 Now before I leave, is there anything  
16 else?

17 MR. BRADY: There are a couple of other matters.  
18 We can address these after the five-minute break.

19 MR. MULROY: I think actually I need to pick some  
20 dates. I don't think there's any negotiations to  
21 leave the room for.

22 MS. SODERNA: I really don't think so. If you

1 would like -- does that include putting an earlier  
2 date on subpoenas just out of safety sake, then if  
3 we have to juggle it, well, I guess we can just say  
4 the 15th and 16th? I'll just redraft the subpoenas  
5 and send them to you.

6 JUDGE MORAN: I actually didn't think it was a  
7 negotiation thing.

8 MS. SODERNA: Just a schedule issue.

9 JUDGE MORAN: The judge ask you a question  
10 sometimes you can't concentrate as well as when the  
11 judge leaves the room.

12 MS. SODERNA: I think that will be fine. Why  
13 don't we say 15th and 16th. I'll change subpoenas,  
14 E-mail to you. If we have to adjust it after that,  
15 we'll just adjust it.

16 JUDGE MORAN: Okay. Anything else?

17 MR. BRADY: This may be a premature time to bring  
18 it up, but in our discussion this morning with all  
19 the parties, there was a discussion about the use of  
20 documents that were identified as confidential and  
21 privileged. Staff's motion for this and identified  
22 that for taking depositions and identified the fact

1 that we were going to be asking questions about  
2 transactions and also about documents that have been  
3 produced during 2004.

4 All of those documents -- hard copies  
5 are all identified as being confidential. The  
6 electronic documents have both a confidential and  
7 attorney/client privilege moniker on them shall we  
8 say. Some of those documents we do intend to be  
9 used in the depositions and Peoples Gas had made the  
10 statement that maybe witnesses would not be  
11 responsive to those documents in light of their  
12 status as a confidential and privileged document,  
13 which would then seriously prevent even a need to  
14 have these depositions --

15 JUDGE MORAN: I'm not sure I follow that.

16 MR. BRADY: -- which can be more specifically  
17 asked, so I could give you further clarification.

18 JUDGE MORAN: Why wouldn't a witness be  
19 responsive to something just because it's  
20 confidential or attorney/client? I just don't know.  
21 There seems to be something I'm not getting.

22 MR. BRADY: That was the statement that was

1 raised by Mr. Mulroy in our meeting this morning, so  
2 it just raises a question in our mind and I don't  
3 know if he can address now.

4                   My concern we get in these depositions,  
5 and if there's a statement that he objects to the  
6 document as being confidential and privileged and  
7 says his witness is not going to respond to the  
8 question, we could have an issue brought before you  
9 at that time, so I guess whether we raise it now or  
10 whether we raise it at that point, I guess I figured  
11 I would put that on the table.

12       MR. MULROY: And I hate to remind you of this.  
13 You remember the procedure we had agreed to for  
14 privileged and confidential material, which is work  
15 up to this point where they identified documents and  
16 we say that remains privileged and then we have you  
17 decide it, us having the burden of proof that it's  
18 privileged, and the same for confidential, since  
19 they may not show the same documents before the  
20 deposition.

21                   If they show a witness an  
22 attorney/client privilege document, which we deem to



1 be attorney/client privilege after we reviewed it at  
2 the deposition, then it seems to me the witness --  
3 they should not be using that document and the  
4 witness shouldn't be answering any questions about  
5 it, and the same presumably holds true for  
6 confidential documents, although it seems an easier  
7 way around that or one way around that is to mark  
8 the depositions themselves confidential and they can  
9 ask whatever questions they want about these  
10 confidential documents.

11 I think there's two issues here, one,  
12 therefore, is to keep the hurdle of the confidential  
13 nature or proprietary nature of the document can be  
14 solved by letting them ask questions of the witness,  
15 but by making the depositions confidential thereby  
16 preserving the document and questions and answers  
17 surrounding it.

18 The attorney/client privilege or work  
19 product issues, that's obviously more difficult, and  
20 if the document that they use or produce is deemed  
21 to be attorney/client privilege, it seems to us that  
22 we are going to have the witness continue to assert

1 the privilege in order to protect the document.

2 MR. BRADY: By virtue of a document, if it's  
3 confidential, it doesn't change whether we can use  
4 the information or not, just the manner in which we  
5 handle the information.

6 It is staff's view that we should be  
7 able to ask questions upon any document they have  
8 given us. The transcript itself is not going to be  
9 posted on E-Docket. It's not of a public nature.  
10 It's something that's just going to be given to  
11 parties.

12 The document itself does not and the  
13 use of the document in the deposition does not  
14 change its status as to whether it is privileged or  
15 confidential. That is still an item to be  
16 determined in staff's view if that document is to be  
17 used in the case, not during discovery. If it's to  
18 be used in our testimony or at the hearing, at that  
19 time then the determination as to whether it's  
20 confidential or privileged can be decided then. It  
21 doesn't necessarily need to be decided now during  
22 discovery.

1 JUDGE MORAN: Well, I think there's a few things  
2 going on, and one thing is that we have to keep  
3 asserting the privilege or it disintegrates.

4 It sounds like you may have two  
5 different kinds of attorney/client, which -- and  
6 they are very different. Attorney/client work  
7 product is very different from attorney/client  
8 privilege, so it's a little hard for me to answer  
9 that.

10 It seems to me that it's -- without  
11 knowing more attorney/client privilege things, you  
12 are going to have a tough time on that. I don't  
13 know the facts. You are going to have a tough time  
14 getting those into a position where you could use  
15 them at trial; on the other hand, confidential  
16 documents are different. I don't see the harm in  
17 marking a deposition confidential.

18 MR. BRADY: As long as we don't then have to  
19 argue -- staff's concern if we mark everything  
20 confidential within that document, there may be  
21 questions on matters that aren't necessarily  
22 confidential, weren't about documents that had a

1 confidential nature to it if it was a document -- a  
2 question about a document from the website, for  
3 instance, or something to that effect, and the other  
4 matter is regarding the privilege.

5                   Peoples Gas may kind of split the way  
6 the privilege is applied here depending upon how the  
7 document was produced. When the documents -- the  
8 hard copies were actually produced, Peoples Gas made  
9 a a privilege log, so the only thing that attributes  
10 to those documents is just confidentiality.

11                   The electronic documents, as you may  
12 recall, they were produced also as being  
13 confidential but also to expedite the production of  
14 those documents. Peoples Gas did not waive the  
15 ability to maintain or to declare that document is  
16 privileged, so those documents may have -- they have  
17 an outstanding determination as to whether they are  
18 privileged. Now it's privileged to use as a  
19 document in evidence, not necessarily use of it as  
20 the document during discovery.

21       JUDGE MORAN: Right, but I don't understand.  
22 These are discovery depositions, so how are you hurt

1 at trial? Your only use at trial would be to  
2 impeach a witness with a discovery deposition.

3 MR. BRADY: Yes. I wasn't thinking as far as  
4 that far. I was just identifying the fact that we  
5 could walk into the depositions and the first  
6 document we show it's identified as either a  
7 confidential document and then Peoples Gas say, no,  
8 we are not going to respond to those questions  
9 because of its nature.

10 If that's -- and maybe it is something  
11 that needs to be handled on a case-by-case basis and  
12 not ripe for review at this point, but that's the  
13 only reason why I raised this is we got stuck dead  
14 in the water right as we open up the door to use.

15 JUDGE MORAN: I don't understand Mr. Mulroy to  
16 say that the witness wouldn't answer, just that the  
17 witness' answer may have been -- may have to be kept  
18 confidential.

19 MR. MULROY: Right. On the confidential  
20 documents, an attorney/client privilege is a  
21 separate issue. It's a separate and distinct issue,  
22 as you pointed out. I don't want to lose the

1 confidentiality designation that we have made to  
2 certain documents by having a witness testify about  
3 it because that somehow breaches the confidentiality  
4 nature or assertion because the deposition is then  
5 itself not confidential, so I'm just suggesting that  
6 we keep the deposition confidential, then we don't  
7 have to worry about this confidential proprietary  
8 issue at all if we do that.

9                   Now you still have to worry about the  
10 attorney/client privilege issue, which is -- which  
11 can be waived in discovery and not just at trial, so  
12 I don't think if you -- if you assert or try to use  
13 an attorney/client privilege document, we are going  
14 to have to come to the judge and have her rule on  
15 it.

16       MR. BRADY: Well, I would be willing to say right  
17 now on behalf of staff that any answers, any  
18 response given by a witness of Peoples Gas during  
19 these depositions staff would not constitute as  
20 being a waiver of any confidentiality or privilege  
21 that they have already asserted, so we have no  
22 problem with that matter.

1 JUDGE MORAN: This includes attorney/client and  
2 confidential things.

3 MR. BRADY: Yes. Given that that matter, you  
4 know, it may be challenged eventually. If a  
5 document is to be used during evidentiary matters at  
6 that point, then you may need to make a  
7 determination as to whether it's confidential or  
8 whether it's privileged. Until that point, we view  
9 it as still maintaining that status until determined  
10 otherwise.

11 JUDGE MORAN: Do you really know if at this time  
12 with certainty that you have attorney/client  
13 documents that you are going to use?

14 MR. BRADY: No, not certainty that we are going  
15 to be using anything that's privileged, so I just  
16 wanted to raise this as a point, just didn't know if  
17 it was going to be ripe at this point, but it was  
18 something that had come up in discussions.

19 JUDGE MORAN: But I still -- I have not quite  
20 seen why it would be a problem to just mark the  
21 deposition confidential.

22 MR. JOLLY: Is it possible when we have questions

1 about a particular document that is mark as  
2 confidential that we could go into an in camera  
3 proceeding and ask that portion be marked  
4 confidential?

5 MR. MULROY: I understand how that works in a  
6 deposition.

7 MR. JOLLY: We just ask that from this point  
8 forward that it be considered confidential and the  
9 protective order that's applicable in this  
10 proceeding would apply to those portions of the  
11 transcript that are marked confidential, but rather  
12 than marking the entire deposition as a whole  
13 confidential, maybe we get around the concern Sean  
14 is addressing that there are probably likely to be  
15 questions about documents that come from a website  
16 or some publicly available source that, you know,  
17 Peoples is not claiming. There's no claim of  
18 confidentiality.

19 JUDGE MORAN: I'm not quite sure why it makes a  
20 difference in a discovery deposition.

21 MR. WEGING: Your Honor, I'm not sure why we need  
22 to have the discovery deposition marked confidential



1 at all. We wanted to avoid this is a confidential  
2 document in camera, here's the public document, back  
3 off camera and get into this long series of pages  
4 going back and forth which often happens in our  
5 hearings when we deal with this stuff. That's why  
6 we were trying to say we'll just deal with it. If  
7 it's a privileged document, it's privileged or not,  
8 you are not waiving it, and if it's confidential,  
9 you are not waiving confidentiality, answer the  
10 question.

11                   The transcript of the deposition is not  
12 put on E-Docket or made public, so, therefore, there  
13 isn't any problem with that happening since the only  
14 people that are going to see the transcript are the  
15 parties to the deposition who are parties to this  
16 case.

17                   If it turns out later on down at  
18 hearing that we need this document and it's  
19 confidential, then we're in the ballgame at trial.  
20 We're going to be going through a lot of  
21 confidential documents, many of whom we don't ever  
22 expect to see the light of day at hearing. We just

1 want to know what this means, what that means, that  
2 kind of thing, but I am concerned about that when  
3 public documents -- that all of a sudden the  
4 transcript answers are being treated on a public  
5 document as being confidential when they cannot be.  
6 It doesn't mean -- no one's sitting here, no, we  
7 don't know of a single question or knew of these  
8 depositions that someone's going to try to bundle it  
9 up into an exhibit and try to put it in a record.  
10 I'm kind of doubtful most of this stuff will see the  
11 light of day in public, but I'm a little bit  
12 concerned.

13                   It's my understanding in the NIGAS case  
14 that depositions were marked confidential and that's  
15 created certain problems in using the material from  
16 those depositions, but I also understand that in  
17 that case the issues have never been resolved  
18 because of the additional problems. There's never  
19 been a ruling on it, and so I'm a little bit leary  
20 on behalf of say -- to just say just mark everything  
21 confidential. I'm more of it is what it is, and if  
22 we use it down the road at the hearing or in

1 testimony, that's the time to deal with it, not in  
2 the middle of a deposition.

3 JUDGE MORAN: You are all subject to the  
4 protective order, and it's Peoples' position  
5 protective orders isn't enough?

6 MR. MULROY: I'm actually not certain. I think  
7 it puts a great burden on the parties to maintain a  
8 confidentiality of these depositions, because  
9 apparently some questions and answers will be  
10 subject and will be under the protective order.

11 We are not going to violate the  
12 protective order, so it's less of a concern to me.  
13 This just seems like an unwieldy situation to me  
14 that you allow the witness to look at, review, and  
15 answer questions about confidential documents and  
16 maybe even attach them to the depositions.

17 The whole think I guess is subject to  
18 protective order, which is fine with us. That,  
19 however, is different than the attorney/client  
20 privilege, which you guys keep talking about in the  
21 same breath.

22 It's one thing to talk about answering

1 questions on confidential documents. It's another  
2 thing inappropriate to answer questions about  
3 attorney/client documents, and even though you are  
4 saying you are not waiving it, that's really --  
5 that's really not enough.

6 I don't see we can be providing  
7 attorney/client privilege information on the record.

8 MR. BRADY: That's the way you produced the  
9 document to us.

10 MR. MULROY: Pardon me?

11 MR. BRADY: That was the manner in which you  
12 produced the documents to us.

13 MR. MULROY: Right, and then we setup this whole  
14 procedure about lifting the designation by showing  
15 it to you and we would say, fine, and not  
16 confidential and we didn't need to argue about it.

17 Anyway, if the parties wish to, you  
18 know, take these depositions without any protection  
19 by not stamping the documents confidential, then,  
20 yes, they're subject to the protective order.

21 JUDGE MORAN: I think I understand what you are  
22 saying. It becomes unwieldy for them, not too much

1 for you.

2 MR. MULROY: Yes.

3 JUDGE MORAN: We may have to address that in the  
4 future then if a problem, be creative on some level,  
5 not the attorney/client privilege, but creative in  
6 terms of how to mold these things as they go along.

7 Anything else?

8 (No response.)

9 Okay. Thanks. Have a good day.

10 MR. BRADY: Thank you.

11 (Whereupon, the above  
12 matter was adjourned.)

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